

LAI (Migration) [2020] AATA 4311 (15 October 2020)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Yu-Jia Lai

CASE NUMBER: 1813944

DIBP REFERENCE(S): BCC2017/3288378

MEMBER: Moira Brophy

DATE: 15 October 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.

Statement made on 15 October 2020 at 2:20pm

CATCHWORDS

MIGRATION – Working Holiday (Temporary) (Class TZ) visa – Subclass 417 (Working Holiday) – false or misleading information – claimed specified work in regional Australia – claim that application completed by friend – applicant bears onus of ensuring information is correct – no approach to department because of language barrier – no compelling or compassionate circumstances to waive requirements – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65
Migration Regulations 1994 (Cth), Schedule 2, cl 417.221, Schedule 4, criterion 4020(1), (3), (5)

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

3. ISSUE

4. The issue in the present case is whether the first named visa applicant, Mr Yu-Jia Lai meets Public Interest Criterion 4020 (PIC 4020) as required by cl.417.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations) for the grant of the visa.

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 April 2018 to refuse to grant the applicant a Working Holiday (Temporary) (Class TZ) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 10 September 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.417.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found the applicant has given, or caused to be given, a bogus document or information that is false and misleading in a material particular in relation to his application and therefore was not able to satisfy PIC 4020 (1)(a). The applicant had not raised any compassionate or compelling circumstances. He therefore was not able to satisfy the requirements of cl. 417.221.
7. The Tribunal exercised its discretion to hold the hearing by telephone. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by telephone, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by telephone. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
8. The applicant gave evidence at a telephone hearing on 13 October 2020.
9. The applicant was represented in relation to the review.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. Public Interest Criterion 4020 (PIC 4020) as required by cl.417.221 for the grant of the visa, broadly speaking, requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

13. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
14. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. The Tribunal is satisfied that the applicant provided information with his application that may be considered to be false and misleading. In making this finding the Tribunal has considered the materials contained in the department file, the evidence given at the time of hearing and materials provided to the Tribunal.
17. On his application Mr Lai stated he had worked at Hoofbeat Farm (ABN 19978724623) from 5 December 2016 to 21 March 2017 in the 2440 regional postcode area.
18. At the time of hearing Mr Lai told the Tribunal he had asked a friend to organise his Working Holiday Extension visa. While he acknowledged he had not at any time undertaken the work at Hoofbeat Farm (ABN 19978724623) in regional Australia as was claimed on his application, he said the provision of that information was not of his doing. He had trusted his friend and they had provided the false information. He said it was difficult for him to complete the application because of the language barrier. He came from a non-English speaking background. When asked if he had contacted the department once he became aware of the false information provided, he said he had not because he found it difficult to communicate because of the language barrier. When asked if he had advised the department of his need for an interpreter, he said he was not aware he was able to do that.

19. PIC 4020 is directed at information which is false, in the sense of purposely untrue, rather than information which lacks the necessary element of fraud or deception (e.g. in the case of an innocent or unintended mistake).
20. In order to be misleading, the Court in *Kaur v MIMAC*⁷ held that the conduct in question must convey or contain a misrepresentation. Such a view is consistent with the interpretation of false or misleading representations about goods or services under the Australian Consumer Law. The representation may be about an existing state of facts or a future such as in circumstances where an applicant must satisfy a criterion with a prospective aspect. For example, the Court in *Kaur v MIBP* observed that the nature of cl.572.223(2)(c), which requires the Minister to be satisfied that an applicant *will have access* to certain funds, requires that the information must form a type of representation as to a future state of affairs.
21. The Explanatory Statement to SLI 2011, No.13 which introduced PIC 4020 states that it was intended that the term ‘information that is false or misleading in a material particular’ will capture any information which is false or misleading that the applicant provides if it is relevant to the purpose for which it is made, namely the purpose being the assessment of the applicant against any of the criteria for the grant of the visa for which he or she has applied, or a visa that the applicant held in the 12 months before the application was made.
22. The Tribunal is satisfied that Mr Lai provided information that was false or misleading in a material on his Working Holiday (Extension) visa application in that he gave evidence indicative of his being able to satisfy the specified work in a regional postcode requirement. While Mr Lai submits it was not him who provided the information but his friend, the application was made by Mr Lai and he bears the onus of ensuring the information in his application is correct. The Tribunal is further satisfied that information that the applicant was able to satisfy this requirement was provided in an attempt to obtain a migration outcome.
23. Since the Tribunal is satisfied the information provided is ‘false and misleading in a material particular’ the Tribunal finds the applicant does not meet cl.4020(1).
24. **Should the requirements of PIC 4020(1) or (2) be waived?**
25. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
26. The expressions ‘compelling circumstances’ and ‘compassionate or compelling circumstances’ are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of ‘compassionate’ relates to feelings of sympathy, sorrow, pity or concern for others.
27. The Explanatory Statement states that it is intended that the granting of the waiver relates solely to compelling circumstances affecting Australia’s interests, or the compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant. The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 include:

- Family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
 - That family members in Australia would be left without financial or emotional support; and
 - A parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).
28. The Tribunal is required to consider all the circumstances of the case including any matters put forward by an applicant and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances justifying the granting of the visa.
 29. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
 30. There was no submission the interests of Australia would be adversely affected if the requirements were not waived.
 31. The applicant submitted the compelling circumstances he relied on were that he was required to continue working in Australia so he could send money back to his parents and younger brother in Taiwan who were dependent on him. Their interests would be adversely affected if he were to go offshore.
 32. While the Tribunal appreciates the concerns of the applicant for his family, they are not Australian citizens, Australian permanent residents or eligible New Zealand citizens.
 33. After considering all of the evidence before it the Tribunal is not satisfied that there are any circumstances in this case that affect an Australian citizen, Australian permanent resident or eligible New Zealand citizen, either on an individual or cumulative basis, that are sufficient to justify the waiver of PIC 4020 and the grant of a Subclass 417 visa to the applicant.
 34. Therefore, the requirements of cl.4020(1) should not be waived.

DECISION

35. The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.

Moir Brophy
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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